87-669

NO.

Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1987

HUBERT P. DAIGLE, PETITIONER

VERSUS

PATASCHNICK-HARRISON CONSTRUCTION COMPANY, ET AL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

WALTER J. SENETTE,JR.
BORNE, SENETTE, AND DUPLANTIS
709 MAIN STREET/P.O. BOX 582
FRANKLIN, LOUISIANA 70538
(318)828-2003

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit erred when it refused to remand the case to the State court where the action was originally filed due to the fact that 28 USCA 1445(A) statutorily prohibited the original Jones Act action from being removed to Federal District Court.

2. Whether the United States Court of Appeals for the Fifth Circuit erred when it refused to overrule the action of the trial court in allowing, over objection, the introduction into evidence of 200 pages of extensive

documentory evidence containing details of the appellant's alleged criminal history despite the fact that this 200 page document contained allegations and material outside the scope of permissible evidence as required by Federal Rule of Evidence 609(A), a lack of proper foundation or any finding by the court that the probative value of admitting outweighed its prejudicial effect.

3. Whether the United States Court of Appeals for the Fifth Circuit erred when it refused to overrule the trial court's denial of appellant's Motion for a Mistrial when, during closing argument, counsel for

defendant improperly commented on evidence which had been excluded by a previous ruling by the trial court.

LIST OF INTERESTED PARTIES

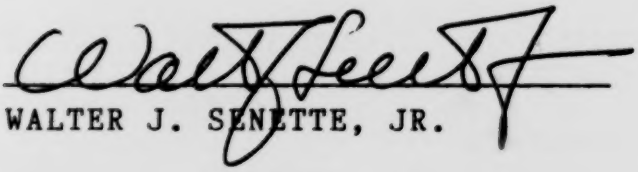
The undersigned counsel of record for the plaintiff-appellant certifies that the following listed parties and organizations have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications of recusal.

1. HUBERT P. DAIGLE
PLAINTIFF-APPELLANT

2. PATASCHNICK-HARRISON CONSTRUCTION COMPANY
APPELLEE-DEFENDANT

3. ALLEN J. BORNE and WALTER J. SENETTE (BORNE, SENETTE & DUPLANTIS), attorneys for APPELLANT

4. THOMAS J. GRACE, BRUCE G. WHITTAKER (COURTENAY, FORSTALL, GRACE & HEBERT) attorneys for APPELLEE



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STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS ENVOKED

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 2, 1987, rehearing denied July 27, 1987 in the action styled Hubert P. Daigle v. Pataschnick-Harrison Construction Company, in the United States Court of Appeals for the Fifth Circuit No. 86-4631. The jurisdiction of the court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Appellant, Hubert P. Daigle (hereafter Daigle) was employed as a seaman for the defendant Pataschnick-Harrison Construction Company (hereafter defendant). Daigle was injured when he slipped and fell down a stairwell aboard a vessel in navigation. Daigle filed a suit in state court in the 16th Judicial District Court in Franklin, St. Mary Parish, Louisiana, under the Jones Act for personal injury damages incurred as a result of this accident. Pursuant to a motion filed by

defendant, the case was removed to the United States District Court for the Western District of Louisiana in Lafayette, Louisiana.

Trial was held and judgment rendered by a jury on July 30, 1986, and signed by Judge John Duhe, Jr. on August 5, 1986. On August 15, 1986 Judge John Duhe, Jr. rendered judgment denying Daigle's Motion for a JNOV and in the alternative a New Trial.

Daigle timely appealed the decision to the United States Court of Appeal for the Fifth Circuit. The Court of Appeals rendered an opinion affirming the lower court on July 2, 1987. On July 27, 1987 Daigle's petition for a rehearing was denied.

REASONS FOR GRANTING THE WRIT

This court should grant the appellant's Petition for a Writ of Certiorari because of the failure of the United States District Court for the Western District of Louisiana and United States Court of Appeals for the Fifth Circuit to properly apply established jurisprudential and statutory rules of evidence and procedure. Appellant believes the foregoing Reasons for Granting the Writ are in accord with the guidelines set forth in Rule 17(a)(c) of the Supreme Court Rules.

The facts of this case are unremarkable. Appellant was injured

when he fell down a stairway while working as a seaman on a vessel in navigation. As a result of this fall he sustained serious injury which rendered him permanently disabled.

Did the United States Court of Appeals for the Fifth Circuit err when it refused to remand the case to the State court where the action was originally filed due to the fact that 28 USCA 1445(A) statutorily prohibited the original Jones Act action from being removed to Federal District Court?

The Court of Appeals for the Fifth Circuit erred when it failed to remand this cause back to state court in the Sixteenth Judicial District Court in St. Mary Parish, Louisiana despite the fact that federal law expressly prohibits the

removal of a Jones Act case.[1] As noted earlier this action was commenced by the appellant in state court and improperly removed by motion of the defendant. The court reasoned that while the removal was contrary to law the fact that appellant failed to object until after trial operated as a waiver of his right to object.[2]

This is an improper award of jurisdiction to a federal district court which is impermissible under the laws of our constitution. Section 1445(A) statutorily excludes from the district court subject matter jurisdiction in

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1 28 USCA 1445(A)

2 Lirette v. N.L. Sperry Sun, Inc. 820 F2nd 116, (5th Cir. 1987)

Jones Act cases commenced in state court by the injured seaman and may not be waived.

This court has an obligation under Rule 17 of the Supreme Court Rules to accept writs in this matter to instruct the courts of the entire nation that grants of subject matter jurisdiction may not be expanded except by specific grants of legislative authority.

Did the United States Court of Appeals for the Fifth Circuit err when it refused to overrule the action of the trial court in allowing, over objection, the introduction into evidence of 200 pages of extensive documentory evidence containing details of the appellant's alleged criminal history despite the fact that this 200 page document contained allegations and material outside the scope of permissible evidence as required by Federal Rule of Evidence 609(A), a lack of proper foundation or any finding by the court

that the probative value of admitting outweighed its prejudicial effect.

The trial court committed error in this case in admitting into evidence, over objection, a 200 page document which contained the plaintiff's alleged criminal history and in allowing defendant's counsel to discuss evidence not in the record before the jury during closing argument.

In analyzing on appeal the trial court's admission of the plaintiff's criminal record into evidence FRE Rule 103 provides for the following framework or standard of review. First, was the ruling admitting the evidence erroneous? Second, did the plaintiff properly object to the ruling or is the admission "plain error" within FRE 103? Third, did

the ruling affect a "substantial right" of the plaintiff as that term is used in FRE 103 (a).

Defendant's Exhibit 10 is a 200 plus page booklet which details the alleged criminal record of the appellant.[3] It starts in 1960 or 26 years ago with a police report of a fight at a bar between four junviles including the plaintiff which did not result in any arrest. Also included in the booklet are numerous narrative police reports, witnesses statements, and hand written comments concerning the

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[3] Attached to this brief as Appendix A is a summary of Defendant's Exhibit No. 10.

incidents.[4] All 35 of the incidents were either misdemeanors or were reduced to misdemeanors before the plaintiff was found guilty or pled guilty. Of the 35 incidents 26 were more that 10 years old.

This exhibit was allegely introduced to impeach the credibility of the plaintiff during his cross examination[5] and immediately after he had admitted that he had been charged and convicted of a number of crimes.[6] It is the appellant's position that it was

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[4] Id.

[5] Transcript, Vol. II, p.25.

[6] Transcript, Vol. II, pp. 18-25.

introduced to show Daigle to be a "bad man" and to cause the jury to decide the case on factors other than the merits

At trial the plaintiff initally objected to the admissibility of the evidence as containing hearsay in violation of FRE 802. This objection was overruled.

The following day and before the exhibit was shown to the jury the plaintiff reurged his objection and stated that the exhibit was "extremely damaging and go back a number of years." Although not stated in the specific terms of FRE 609 and 403 it is clear from the context of trial that this was the intended objection.

Not one of these 35 incidents were admissible under FRE 609. Even assuming that some of these crimes qualify under FRE 609 (a) the court is required to also determine whether "the probative value of admitting this evidence outweighs its prejudicial effect." The trial court did not do this in this case. Nor did the trial court make a similar determination under FRE 403 which provides for the exclusion of relevant but excessively prejudicial evidence.[7]

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[7] RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.

FRE 103 provides (1) that when an objection to evidence is made it must be "timely" and must state the specific grounds for the objection "if the specific ground was not apparent from the context." The appellant argues that the objections made by plaintiff were proper and the specific grounds for such were evident from the context. Although the inital objection was "hearsay, nothing else" counsel went on to state "I haven't had an opportunity to review everything that he had in front of him **either**."[8] This is clearly an invocation of an objection based on both FRE 801-804 [Hearsay] and FRE 609 (b) [requires

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[8] Transcript, Vol. II, p.25.

notice to use conviction more than 10 years old]. Plaintiff's counsel had not seen Defendant's Exhibit No. 10 prior to it being offered into evidence. Further it is clear from the context in which the objection was made that counsel was also making a FRE 609 (a) objection as well when in response to a question by the court as to which item he was objecting to he stated "As to the whole thing."[9] It is obvious that this was an objection to the introduction of the entire exhibit under FRE 609 (a) and (b) and not only to those parts which were hearsay.

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[9] Transcript, Vol. II p. 25.

This is a Jones Act case. It was tried to a jury. The United States Supreme Court has indicated that the congressional intent in enacting the Jones Act was to secure to seamen jury determinations of factual issues in a larger proportion of cases and to a larger degree than would be true of other causes of actions tried in federal court.[10] It is important to keep this in mind when considering the effect of

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[10] Boeing Company v. Shipman, 411 F.2d 365, (5th Cir. 1969); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 US 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962); Comeaux v. T. L. James & Co. Inc., 702 F.2d 1023, (5th Cir. 1983); Gaspard v. Taylor Diving & Salvage Co., 649 F.2d 372, (5th Cir. 1981) cert. denied, 455 US 907 (1982); Ferguson v. Moore-McCormack Lines, 352 US 521, 1 L ed 511, 77 S CT 457, (1957).

Defendant's Exhibit 10 on the jury verdict and plaintiff's substantial rights.[11]

In the present case an analysis of the facts presented the jury in light of the jury's answers to the jury interrogatories shows that the admission of D-10 did "trigger their punitive instincts."[12] The jury, despite the

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[11] FRE Rule 103 (a)

[12] Shows V. M/V Red Eagle, 695 F.2d 114, at 119 (5th Cir. 1983) See also Brown v Coating Specialists, Inc., 465 F.2d 340 (5tn Cir. 1972) where the plaintiff admitted to two felony convictions and the court reversed and remanded for a new trial because evidence of other bad acts which did not result in convictions was put before the jury. A consideration in that case was the fact that the jury answered "no" to the very first question of whether or not a an accident took place. Brown at p. 341.

overwhelming evidence to the contrary, found that the defendant was not negligent and the vessel seaworthy.

In any event, the issue of the plaintiff's credibility was central to any decision in the case as defendant's counsel stated no less than three separate times in his closing argument.[13]

Finally and perhaps most importantly in terms of the "realities of the courtroom"[14] the extrinsic

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[13] Transcript, Vol. III p.37 (twice) and p. 41 when defendant's counsel stated "Every thing that goes on in this case is really over the major issue of the credibility of the witnesses."

[14] Shows V. M/V Red Eagle, 695 F.2d 114, at 119 (5th Cir. 1983)

evidence in this case was real or documentary evidence. This court is no doubt aware of the tremedous affect real-documentary evidence has on a jury. D-10 speakes for itself. The 200 pages of official looking documents detail each and evey incident in the plaintiff's life that involved him with the police.

Did the United States Court of Appeals for the Fifth Circuit err when it refused to overrule the trial court's denial of appellant's Motion for a Mistrial when, during closing argument, counsel for defendant improperly commented on evidence which had been excluded by a previous ruling by the trial court.

In closing argument the defendant referred to a lawsuit concerning a

separate incident alleging that the plaintiff had filed a separate lawsuit because of a fight he had been in with a deputy sheriff in which he alleged that he had also hurt his back. Despite the fact that he introduced no evidence of this lawsuit the defendant referred to it in his closing argument. Was this improper argument and to what extent did it affect the jury verdict?

The plaintiff was severely prejudiced when counsel for defendant PATASCHNICK-HARRISON made specific reference to evidence that had been excluded from being admitted into trial. This was done twice: once by interrupting plaintiff counsel's closing

argument to comment on this excluded evidence and again in defense counsel's own closing statement.[15]

During the course of the trial, defendant Pataschnick-Harrison, attempted to call as a witness a police officer who had been involved in an altercation with Mr. and Mrs. Daigle. Defendant had failed to list this officer in the Pre-trial Order and plaintiff was suprised at trial with the suggestion that he would be called as a witness. Plaintiff objected to his testimony being allowed and this objection was sustained. The police officer was not allowed to testify.

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[15] Transcript, Vol. III pp. 28-29 and 47-48.

In his opening statement, counsel for defendant told the jury that he would offer evidence that the plaintiff had spit in this officer's face during the altercation.[16] Mr. Daigle denied that he had ever done so and defendant offered no proof to substantiate this version of the facts. The only possible reason for offering such evidence is obvious. It was intended to prejudice the jury against Mr. Daigle.

During closing statement, plaintiff's counsel reminded the jury of defendant's promise to prove that Hubert Daigle had spit in this officer's face but had failed to produce any evidence

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[16] Transcript, Vol. I p.30.

in support of this promise. At this point in the trial, counsel for defendant interrupted plaintiff counsel's argument and in the presence of the jury objected to plaintiff counsel's reference to his failure to produce any evidence on this fact. Defendant's counsel argued in front of the jury that the only reason the testimony of the police officer was not offered was because plaintiff's counsel had prevented him from doing so. Immediately, counsel for plaintiff requested a side bar conference and asked for a mistrial on the bases of this extrememly prejudicial behavior and statements by defense counsel. The court denied the motion informing

plaintiff counsel that it was not improper. With that ruling in hand defense counsel re-iterated these remarks during his own closing statement telling the jury that the reason the officer did not testify was due to plaintifff counsel's objection.

It is improper for counsel in his argument to the jury to comment on evidence which was excluded by the court when offered on the trial, suggest the impression that certain excluded evidence would have made on the jury had the court permitted counsel to introduce it or otherwise to make statements which are intended to get before the jury

facts which counsel was not entitled to give in evidence on the trial.[17]

The effect of the courts ruling in this matter was devastating to the plaintiff's right to a trial by jury based on Federal procedural and evidenciary rules. By allowing defense counsel to make such statements without admonishion and in fact allow him to re-urge the remarks during his closing, the earlier excluded evidence was placed before the jury without the benefit of cross examination or prior notice (in that the officer was not named as a witness on the Pre-trial Order).

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[17] 75 Am. Jur. 2nd 253 page 252-254.

CONCLUSION

Writs should be granted pursuant to Supreme Court Rule 17 for the following reasons. (1) The refusal to remand the case after improper removal was in violation of established constitutional and statutory limitations on the subject matter jurisdiction of federal district courts. (2) The appellant was prejudiced by the improper introduction of evidence which failed to conform to established statutory and jurisprudential guidelines. (3) The appellant was prejudiced by the trial court's denial of a mistrial motion after defendant's counsel had inflamed

the jury by commenting on alleged facts which had been excluded from evidence.

By Counsel:

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BY:
WALTER J. SENETTE, JR.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading had been served on all counsel of record by placing a copy of same in United States mail, postage prepaid on this 9TH day of OCTOBER, 1987.

WALTER J. SENETTE, JR.

87-669

NO.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

HUBERT P. DAIGLE, PETITIONER

VERSUS

PATASCHNICK-HARRISON CONSTRUCTION COMPANY, ET AL, RESPONDENTS

****

ON PETITION FOR WRIT OF CERTRIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

****

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

HUBERT P. DAIGLE, PETITIONER

VERSUS

PATASCHNICK-HARRISON CONSTRUCTION
COMPANY, ET AL, RESPONDENTS

****

ON PETITION FOR WRIT OF CERTRIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

****

APPENDIX "A"

EXHIBIT D-10 UNITED STATES DISTRICT COURT

CONSIST OF OVER 200 PAGES

CRIMINAL RECORDS OF HUBERT DAIGLE

1. 09/17/60 **Charge:** Disturbing the peace.
2. 10/16/60 **Charge:** Disturbing the peace.
3. 05/14/61 **Charge:** Reckless Driving.
4. 06/03/61 **Charge:** Reckless Driving.
5. 06/10/61 **Charge:** Disturbing the peace.
6. 06/30/61 **Charge:** Car Accident.
7. 08/07/61 **Charge:** Having no life preserver.
8. 08/16/61 **Charge:** Shocking fish.
9. 09/03/61 **Charge:** Disturbing the peace.
10. 10/05/61 **Charge:** Car accident.

11. 02/03/62 **Charge:** Disturbing the peace.

12. 08/16/64 **Charge:** Aggravated battery.

13. 02/06/65 **Charge:** Two counts of Disturbing the peace.

14. 06/12/65 **Charge:** Disturbing the peace.

15. 06/19/65 **Charge:** Disturbing the peace.

16. 04/15/66 **Charge:** Disturbing the peace.

17. 03/05/70 **Charge:** Traffic Accident.

18. 05/10/70 **Charge:** Battery (Donald Michell).

19. 09/12/70 **Charge:** Writing bad checks.

20. 12/24/70 **Charge:** Traffic violation.

21. 07/09/72 **Charge:** Disturbing the peace.

22. 05/03/75 **Charge:** Disturbing the peace, Battery on an officer, and resisting

arrest.

23. 05/25/75 **Charge:** Interfering with and threatening an officer.

24. 06/21/75 **Charge:** Conservation violations: undersized catfish and no boat registration.

25. 06/13/76 **Charge:** Disturbing the peace.

26. 07/07/76 **Charge:** Reckless driving.

27. 09/18/76 **Charge:** DWI and reckless driving.

28. 03/11/78 **Charge:** DWI and driving too closely to another vehicle, which resulted in car accident.

29. 05/17/78 **Charge:** DWI-2nd offense.

30. 12/09/79 **Charge:** Disturbing the peace.

31. 01/12/80 **Charge:** Disturbing the peace, resisting an officer, threatening an officer and drunk in public.

32. 04/11/81 **Charge:** Disturbing the

peace by fighting.

33. 07/13/82 **Charge:** Conservation Violation: Operating unregistered boat and no PFD requirements.

34. 04/24/83 **Charge:** Simple Battery on a police officer, criminal damage to property, and resisting arrest.

35. 12/24/84 **Charge:** Disturbing the peace.

APPENDIX "B"

16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARY
STATE OF LOUISIANA

HUBERT P. DAIGLE DOCKET NO. 69,236

VERSUS DIVISION: "F"

PATASHICK-HARRISION CONSTRUCTION COMPANY, AND THE VESSEL MR. JOE, IN REM

****

COMPLAINT

Petitioner, HUBERT P. DAIGLE, who for his petition by his attorneys alleges as follows:

I.

Petitioner, HUBERT P. DAIGLE, is of full age of majority, an American seaman, a member of the crew of a vessel

and a resident of Assumption Parish, Louisiana, who brings this complaint under the Jones Act and the General Maritime Laws of the United States.

II.

Made defendants herein are PATASHICK-HARRISON CONSTRUCTION COMPANY, a domestic corporation, authorized to do and doing business in the State of Louisiana, and particularly within the Parish of St. Mary, and the vessel MR. JOE, IN REM.

III.

That on or about September 10, 1982, your petitioner, a seaman and member of a labor crew, was assigned by

his immediate employer, PATASHICK-HARRISON CONSTRUCTION COMPANY, to work aboard a dredge, said dredge, the MR. JOE, being located in navigable waters in St. Mary Parish, State of Louisiana, and while working aboard said vessel owned by defendant, petitioner was seriously injured when he slipped and fell in the engine room of the MR. JOE, thereby causing petitioner to receive grievous, painful and permanently disabling injuries to his back.

IV.

That on the day in question, it was the duty of said respondents, PATASHICK-HARRISON CONSTRUCTION COMPANY, to furnish your petitioner with ample,

proper and reasonable safe appliances, safeguards, tools and working conditions, to furnish petitioner with a sufficient number of competent co-employees, promulgate and enforce proper rules for the safe conduct of the petitioner and other working aboard and about said vessel and for the proper operation thereof; and to properly instruct your petitioner and others as to performance of their duties, and to warn petitioner of the dangers arising and to be encountered therein, as well as to protect petitioner from said dangers, and to furnish petitioner with prompt, competent, proper medical care upon his becoming ill or injured.

V.

That the said accident herein sued upon, was caused by the negligence of the defendant, PATASHICK-HARRISION CONSTRUCTION COMPANY, their agents, servants and employees in failing to warn your petitioner of the impending dangers and perils; and failing to promulgate and enforce proper rules for the operation of the aforesaid vessel, and the work and activities being conducted therein; failing to properly superintended and supervise the work aboard the vessel; failing to provide the petitioner with a safe place in which to work; in failing to provide for the use of petitioner, proper equipment for cleaning the vessel; failing to

provide a seaworthy vessel, in breaching their obligation to provide a seaworthy vessel; in failing to provide an adequate crew, to properly maintain the barge and/or supervisory personnel or crew members to complete the work safely, as a result, petitioner was thrown to the deck injuring his back and defendants are otherwise actively and passively negligent.

VI.

As a direct result of the negligence and fault of the defendants, your petitioner received injuries which permanently and totally disabled him; and caused him great pain and suffering, and said injuries were caused by such

failure and by the negligence of said employer.

VII.

Petitioner has been required and advised to undergo medical surgical and prolonged hospitalization and other treatment for his acute injuries and for the serious residuals thereof. He has suffered physical and mental pain and anguish; he has been handicapped in other activities; these conditions will continue indefinitely and will become worse and permanent, all of which are to his damages in the sum of ONE MILLION AND NO/100 ($1,000,000.00) DOLLARS.

III.

Petitioner alleges that the nature of the accident and the resulting injuries were such that it would have not occurred in the absence of negligence and accordingly, your petitioner, specifically pleads the benefit of the doctrine of "res ipsa loquitor" and he brings this action under the provisions of the General Maritime Law for the negligence of the defendant, unseaworthiness of the vessel, the Jones Act and any other causes of action he may have under the laws of the State of Louisiana and the United States.

AS AND FOR A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION

Petitioner repeats, reiterates and realleges each and every allegation hereinabove stated as applicable herein.

IX.

The injuries to petitioner and the pain and suffering thereto were directly caused by the failure of the respondent to furnish a seaworthy vessel and appliance; in failing to provide a proper means by which petitioner could perform the job he was assigned; in failing to provide an adequate crew and supervisory personnel; in failing to provide protective appliances to perform

the work; exposing petitioner to great personal danger; and the vessel or vessels owned by the respondent were otherwise unseaworthy.

X.

By reason of the unseaworthiness of the respondent's vessel, petitioner was caused to suffer severe injuries, pain and mental anguish from which he is permanently disabled.

XI.

That by reason of the unseaworthiness of the respondent's vessel as aforesaid and the failure to provide equipment, there was a breach of contract and warranty of seaworthiness

and this cause of action is maintained under the General Maritime Law.

XII.

That by reason of the aforesaid breach of contract and warranty, petitioner has been damaged in the sum of ONE MILLION AND NO/100($1,000,000.00) DOLLARS.

XIII.

Upon petitioner becoming injured, it was the duty of the respondent-employer to provide him with maintenance, care and cure during the entire period of his convalescence.

XIV.

Defendant may arbitrarily and without just cause, fail and refuse to pay the maintenance, care and cure to which your petitioner is entitled. Petitioner further requests the said maintenance and cure and alleges that he is entitled to maintenance at a reasonable rate for the cost of his cure and in addition thereto, medical care, including future payments and penalties and attorney's fees if the respondent arbitrarily fails to pay these benefits, all in the sum of FIFTY THOUSAND AND NO/100 ($50,000.00) DOLLARS.

XV.

Petitioner demands a jury trial on all issues.

XVI.

Petitioner reserves the right to supplement and amend his damages as they become apparent and are manifest to him.

WHEREFORE, premises considered, petitioner prays that process of this Honorable Court may issue and be served upon respondent, PATASHICK-HARRISON CONSTRUCTION COMPANY, serving its designated agents for service of process requiring them to appear and answer herein, that after final hearing thereof, petitioner may have judgment

against respondents for his damages, jointly and in solido, and for his maintenance and cure hereinabove set out, together with interest as is proper under the law, costs expended in his behalf, and all other further relief to which petitioner may be entitled under the laws, statutes and court decisions which comprise the Maritime Law of the United States and the Court's interpretation of the Jones Act, and petitioner prays for a trial by jury on all issues triable by jury.

By Counsel,
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ATTORNEYS FOR PETITIONER
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BY: **ALLEN J. BORNE**

A/B-19

Please serve defendant:

Patashick-Harrison Construction Co.
Highway 174 West
Cape Girardeau, MO

Received and filed with St. Mary Parish
Clerk's office on February 24, 1983

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HUBERT P. DAIGLE	CIVIL ACTION
VERSUS	NO. 83-1568
PATASHICK-HARRISON CONSTRUCTION COMPANY AND THE VESSEL MR. JOE, IN REM	SECTION "D"

* * * * * * * * * * * * * * * * * * * *

PETITION OF DEFENDANTS, THE DREDGE MR. JOE AND PATASHICK-HARRISION CONSTRUCTION COMPANY FOR REMOVAL

The petition of the Dredge MR. JOE, In Rem, and Patashick-Harrison Construction Company, In Personam, respectfully represent:

1.

Plaintiff, Hubert P. Daigle, instituted an action in the 16th Judicial District Court, Parish of St. Mary, entitled "Hubert P. Daigle vs. Patashick-Harrison Construction Company and the vessel MR. JOE, In Rem", Number 69,236 "F" on the docket of the said Court, seeking to recover damages in the amount of TWO MILLION FIFTY THOUSAND AND 00/100 ($2,050,000.00) DOLLARS, together with interest and costs for personal injuries allegedly sustained on September 10, 1982, on board the vessel, MR. JOE.

2.

The plaintiff's original action was based upon the provisions of The Jones

Act, U.S.C. s688; The General Maritime Law against the vessel In Rem, and for maintenance and cure.

3.

The site of the alleged accident was on the navigable waters in St. Mary Parish, State of Louisiana. Consequently, this Honorable Court has jurisdiction thereof pursuant to 28 U.S.C. s1333, and the Admiralty Rules Supplemental thereto.

4.

The original plaintiff has brought an action against the vessel MR. JOE, In Rem, which action can only be brought in the Federal District Court, pursuant to

the In Rem, Admiralty and Maritime Provisions of the Federal Rules of Civil Procedure.

5.

The original plaintiff is a citizen of the State of Louisiana, and the defendant, Patashick-Harrison Construction Copmpany is a Missouri Corporation with its principal place of business in Cape Girardeau, Missouri. There is, therefore, diversity of citizenship and the amount in controversy exceeds TEN THOUSAND AND 00/100($10,000.00) DOLLARS, exclusive of interest and costs, and consequently, this Honorable Court has jurisdiction pursuant to 28 U.S.C. s1332.

6.

Defendants, the vessel MR. JOE and Patashick-Harrison Construction Company, are entitled to remove this aforesaid action from the 16th Judicial District Court, Parish of St. Mary, State of Louisiana, to this Honorable Court.

7.

The citation and the plaintiff's original Petition denominated "Complaint", copies of which are attached hereto, all were served on defendant, Patashick-Harrison Construction Company, on June 3, 1983. Therefore, the time for removal, as provided in 28 U.S.C. s1446(d).

WHEREFORE, petitioners pray that this action be removed from the 16th Judicial District Court, Parish of St. Mary, State of Louisiana, to the United States District Court for the Western District of Louisiana.

NEW ORLEANS, LOUISIANA, this 14th day of June, 1983

THOMAS J. GRACE
THOMAS J. GRACE
COURTENAY, FORSTALL, GRACE
& HEBERT
730 Camp Street
New Orleans, LA 70130
(504) 566-1801

FOR COMPLAINT ATTACHED SEE APPENDIX "B"

A/C-26

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing have been served on all counsel of record by placing same in the U.S. Mail, postage prepaid, this 14th day of June, 1983.

THOMAS J. GRACE

A/C-27

V E R I F I C A T I O N

STATE OF LOUISIANA

PARISH OF LOUISIANA

BEFORE ME, the undersigned authority, personally came and appeared:

THOMAS J. GRACE,

who, after being duly sworn, did depose and say:

THAT he is a member in the firm of COURTENAY, FORSTALL, GRACE & HEBERT, attorneys for the vessel MR. JOE, and PATASHICK-HARRISON CONSTRUCTION COMPANY; that Patashick-Harrison Construction Company is a Missouri Corporation, with its principal place of business in Cape

Girardeau, Missouri and that service of the original Petition was served on the Company on June 3, 1983; that he has read the foregoing Petition for Removal, and that the allegations contained therein are true and correct to the best of his knowledge, information and belief.

THOMAS J. GRACE

SWORN TO AND SUBSCRIBED BEFORE ME THIS 4TH DAY OF JUNE, 1983.

Charles K. Sandbald
NOTARY PUBLIC

A/C-29

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISON

HUBERT P. DAIGLE	CIVIL ACTION
VERSUS	NUMBER 83-1568
PATASHICK-HARRISON CONSTRUCTION COMPANY AND THE VESSEL MR. JOE, IN REM	SECTION "D"

* * * * * * * * * * * * * * * * * * * *

REMOVAL BOND

NOW ALL MEN BY THESE PRESENTS:

The undersigned, the vessel, MR. JOE and Patashick-Harrison Construction Company, as principals and Insurance Company of North America, as surety, are firmly held and bound unto Hubert P. Daigle in the sum of TWO HUNDRED FIFTY and 00/100 ($250.00) DOLLARS, payment of

which will and truly be made, we do jointly and severally bond ourselves, our successors and assigns by these presents.

The conditions of the above bond are as follows:

That, whereas the vessel, MR. JOE and Patashick-Harrison Construction Company have filed their Petition in the United States District Court for the Western District of Louisiana for the removal to the said United States District of a certain cause pending in the 16th Judicial District Court, Parish of St. Mary, State of Louisiana, wherein the said Hubert P. Daigle is plaintiff and the vessel MR. JOE, In Rem and

Patashick-Harrison Construction Company are defendants.

Now, if principals hereon shall pay all the costs and disbursements by reason of the removal proceedings, should it be determined that the cause was not removable or improperly removed to the United States District Court, then the obligation hereof shall be void; otherwise to remain in full force and effect.

The vessel MR. JOE,
In Rem, and
PATASHICK-HARRISON
CONSTRUCTION
COMPANY:

BY: THOMAS J. GRACE
THOMAS J. GRACE
COURTENAY, FORSTALL,
GRACE & HEBERT
730 Camp Street
New Orleans, LA 70130

A/C-32

(504) 566-1801
Attorney for the
vessel MR. JOE and
Patashick-Harrison
Construction Company

INSURANCE COMPANY OF
NORTH AMERICA:

BY:_____
ITS ATTORNEY IN FACT

A/C-33

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HUBERT P. DAIGLE	CIVIL ACTION
VERSUS	NUMBER: 83-1568
PATASHICK-HARRISON CONSTRUCTION COMPANY AND THE VESSEL MR. JOE, IN REM	SECTION "D"

* *

NOTICE OF REMOVAL

TO: Mr. Allen J. Borne
BORNE, SENETTE & SENETTE
709 Main Street
P. O. Box 1008
Franklin, Louisiana 70538

PLEASE TAKE NOTICE that the vessel MR. JOE and Patashick-Harrison Construction, defendants in the Petition

entitled "Hubert P. Daigle v. Patashick-Harrison Construction Company and the vessel MR. JOE, IN REM", bearing number 69,236 on the docket of the 16th Judicial District Court for the Parish of St. Mary, State of Louisiana, have on the 20th day of June, 1983, filed in the United States District Court for the Western District of Louisiana, their Petition and bond for the removal of such Civil Action to the United States District Court for the Western District of Louisiana.

Copies of said Petition and bond are herewith served upon you as counsel of record by Hubert P. Daigle; and a copy of said Petition is being filed with the Clerk of the aforementioned

State Court in conformity with 26 U.S.C. s1446, as amended.

NEW ORLEANS, LOUISIANA, this 22nd day of June, 1983.

THOMAS J. GRACE
THOMAS J. GRACE
COURTENAY, FORSTALL,
GRACE & HEBERT
730 Camp Street
New Orleans, LA 70130
(504) 566-1801
Attorney for defendants

A/C-36

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HUBERT P. DAIGLE	CIVIL ACTION
VERSUS	NUMBER 83-1568
PATASHICK-HARRISON CONSTRUCTION COMPANY AND THE VESSEL MR. JOE, IN REM	SECTION "D"

* * * * * * * * * * * * * * * * * * *

PROOF OF SERVICE

BEFORE ME, the undersigned authority, personally came and appeared:

THOMAS J. GRACE

who, after being duly sworn, did depose and say as follows:

THAT he is a partner in the firm of COURTENAY, FORSTALL, GRACE & HEBERT, and

counsel for the vessel MR. JOE and Patashick-Harrison Construction Company; that on the 20th day of June, 1983, after the Removal Petition, Bond and Notice have been filed in this matter, he delivered executed copies of the Notice and of the Petition for Removal to Hubert P. Daigle, through its counsel of record, Allen J. Borne, and the Clerk of Court for the 16th Judicial District Court for the Parish of St. Mary, by placing same in the U.S. Mail, postage prepaid, and properly addressed.

THOMAS J. GRACE

SWORN TO AND SUBSCRIBED BEFORE ME, THIS 22ND DAY OF JUNE, 1983.

A. GILLDYH
NOTARY PUBLIC

APPENDIX "D"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HUBERT P. DAIGLE	* CIVIL ACTION
VERSUS	* NO. 83-1568 "L"
PATASHICK-HARRISON CONSTRUCTION COMPANY, THE VESSEL MR. JOE, IN REM, AND GEORGE ENGINE COMPANY, INC.	* STATE OF LOUISIANA

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FIRST SUPPLEMENTAL AND AMENDING COMPAINT

NOW INTO COURT, through undersigned counsel comes, HUBERT P. DAIGLE, petitioner herein, who wishes to supplement and amend the original complaint filed in this matter in the following respect:

1. By adding GEORGE ENGINE COMPANY, INC., as a defendant to this litigation.

GEORGE ENGINE COMPANY,INC., a foreign or domestic corporation, authorized to do and doing business in the State of Louisiana.

2. By amending paragraph II to read:

Made defendants herein are PATASHICK-HARRISON CONSTRUCTION COMPANY, a domestic corporation, authorized to do and doing business in the State of Louisiana, and particularly with the Parish of St. Mary, the vessel MR. JOE, IN REM, and GEORGE ENGINE COMPANY, INC.

3. By amending paragraph V to read:

That the said accident herein sue upon, was caused by the negligence of the defendants, PATASHICK-HARRISON CONSTRUCTION COMPANY and GEORGE ENGINE COMPANY, INC., their agents, servants and employees in that PATASHICK-HARRISON CONSTRUCTION COMPANY was negligent:

a. Failing to warn your petitioner the impending dangers and perils;

b. Failing to promulgate and enforce proper rules for the operation of the aforesaid vessel, and the work and activities being conducted therein;

c. Failing to properly superintend and supervise the work aboard the vessel;

d. Failing to provide the petitioner with a safe place in which to work;

e. Failing to provide for the use of petitioner, proper equipment for cleaning the vessel;

f. Failing to provide a seaworthy vessel, in breaching their obligation to provide a seaworthy vessel;

g. Failing to provide an adequate crew, to properly maintain the barge and/or supervisory personnel or crew members to complete the work safely;

as a result, petitioner was thrown to the deck injuring his back and defendants are otherwise actively and passively negligent; and GEORGE ENGINE COMPANY, INC., was negligent:

a. Failing to properly clean the engine room in question after working therein;

b. Failing to pick up tools and clean up oil, grease and other substances they left in the engine room.

c. Failing to warn or otherwise notify the plaintiff or any vessel personnel of the condition of the engine room.

4. By amending paragraph VI to read:

As a direct result of the negligence and fault of the defendants, your petitioner received injuries which permanently and totally disabled him; and caused him great pain and suffering, and said injuries were caused by such failure and by the negligence of said employer and GEORGE ENGINE COMPANY, INC.

5. By amending the prayer to read:

WHEREFORE, premises considered, petitioner prays that process of this Honorable Court may issue and be served

upon respondents, PATASHICK-HARRISON CONSTRUCTION COMPANY and GEORGE ENGINE COMPANY, serving its designated agents for service of process requiring them to appear and answer herein, that after final hearing thereof, petitioner may have judgment against respondents for his damages, jointly and in solido, and for his maintenance and cure hereinabove set out, together with interest as is proper under the law, costs expended in his behalf, and all other further relief to which petitioner may be entitled under the laws, statutes and court decisions which comprise the Maritime Law of the United States and the Court's interpretation of the Jones Act, and

petitioner prays for a trial by jury on all issues triable by jury.

By Counsel,

BORNE, SENETTE & SENETTE
ATTORNEYS FOR PETITIONER
709 MAIN STREET
POST OFFICE BOX 1008
FRANKLIN, LOUISIANA 70538
(318) 828-2003

BY:ALLEN J. BORNE

Please serve defendant:

George Engine Company, Inc.
through their attorney of
record;
Mr. St.Paul Bourgeois, IV
1015 St. John Street
Lafayette, La. 70502

APPENDIX "E"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

- - - - - - - - - - - - - - - - - -

HUBERT P. DAIGLE

VERSUS CIVIL ACTION NO. 83-1568 "L"

POTASCHNICK-HARRISON CONSTRUCTION COMPANY, ET AL

- - - - - - - - - - - - - - - - - -

JUDGMENT

This action came on for trial before the court and jury, the Honorable John M. Duhe, Jr., District Judge, presiding, the issues having been duly tried, the court having instructed the jury to make answer to certain special interrogatories, and the jury having duly rendered a verdict and having made

answer to said special interrogatories as follows:

WE, THE JURY IN THE ABOVE-CAPTIONED CASE, UNANIMOUSLY FIND AS FOLLOWS:

INTERROGATORY NO. 1:

WAS DEFENDANT, PATASCHNICK-HARRISON CONSTRUCTION COMPANY, NEGLIGENT, WHICH NEGLIGENCE PLAYED ANY PART, NO MATTER HOW SMALL, IN BRINGING ABOUT OR CAUSING THE ACCIDENT AND INJURIES TO PLAINTIFF, HUBERT DAGILE, ON SEPTEMBER 15, 1982?

ANSWER "YES" OR "NO" ANSWER: NO

REGARDLESS OF HOW YOU ANSWER INTERROGATORY NO. 1 ABOVE, PLEASE ANSWER THE FOLLOWING:

INTERROGARY NO. 2:

WAS THE VESSEL ON WHICH PLAINTIFF

WAS WORKING, THE M/V KENNETH JAMES, OR ANY OF HER GEAR, APPURTENANCES, CREW, TACKLE OR EQUIPMENT UNSEAWORTHY AND, IF SO, WAS THIS UNSEAWORTHINESS A LEGAL CAUSE OF THE ACCIDENT AND PLAINTIFF'S INJURIES ON SEPTEMBER 15, 1982?

ANSWER "YES" OR "NO" ANSWER: NO

IF YOU HAVE ANSWERED BOTH INTERROGATORY NO. 1 AND INTERROGATORY NO. 2 "NO", THEN YOU NEED PROCEED NO FURTHER WITH YOUR DELIBERATIONS; SIMPLY HAVE YOUR FOREMAN SIGN THIS FORM ON THE SPACE PROVIDED BELOW AND RETURN IT INTO COURT AS YOUR VERDICT.

ON THE OTHER HAND, IF YOUR ANSWER TO EITHER INTERROGATORY NO. 1 OR INTERROGATORY NO. 2 IS "YES", THEN PROCEED TO ANSWER THE FOLLOWING INTERROGATORIES, VIZ:

INTERROGATORY NO. 3:

WAS GEORGE ENGINE COMPANY, NEGLIGENT, WHICH NEGLIGENCE PLAYED ANY PART IN BRINGING ABOUT OR CAUSING THE ACCIDENT AND INJURIES TO PLAINTIFF, HUBERT DAIGLE, ON SEPTEMBER 15, 1982?

ANSWER "YES" OR "NO" ANSWER:_____

REGARDLESS OF HOW YOU ANSWERED INTERROGATORY NO. 3 ABOVE, PLEASE ANSWER THE FOLLOWING:

INTERROGATORY NO. 4:

WAS PLAINTIFF, HUBERT DAIGLE HIMSELF NEGLIGENT?

ANSWER "YES" OR "NO" ANSWER:_____

IF THE ANSWER TO NO. 4 IS "YES", ANSWER (A).

(A) WAS THAT NEGLIGENCE A LEGAL CAUSE OF HIS INJURY?

ANSWER "YES" OR "NO" ANSWER:_____

IF THE ANSWER TO ANSWER NO. 4(A) IS "NO", ANSWER (B).

(B) DID THAT NEGLIGENCE PLAY ANY PART, HOWEVER SLIGHT, IN PRODUCING PLAINTIFF'S INJRY?

ANSWER "YES" OR "NO" ANSWER:_____

INTERROGATORY NO. 5:

TO WHAT DEGREE, EXPRESSED IN PERCENTAGE, DID THE NEGLIGENCE OF THE FOLLOWING CONTRIBUTE TO HUBERT DAIGLE'S INJURIES?

IF THE ANSWER TO NO. 1 WAS "YES,"

PATASCHNICK-HARRISON CONSTR. COMPANY _____%

IF THE ANSWER TO NO. 3 WAS "YES,"

GEORGE ENGINE COMPANY _____%

IF THE ANSWER TO NO. 4 WAS "YES,"

HUBERT DAIGLE _____%

(NOTE: THE TOTAL OF THE PERCENTAGES GIVEN SHOULD EQUAL 100%)

INTERROGATORY NO. 6:

STATE THE AMOUNT OF PLAINTIFF'S DAMAGES IN DOLLARS AND CENTS WITHOUT ADJUSTMENT BY APPLICATION OF ANY PERCENTAGES YOU HAVE GIVEN IN INTERROGATORY NO. 5.

ANSWER:_____

WE, THE JURY, HAVE UNANIMOUSLY ANSWERED THE ABOVE AND FOREGOING INTERROGATORIES AS INDICATED ABOVE, AND HEREWITH RETURN SAME INTO OPEN COURT AS OUR VERDICT.

IT IS ORDERED AND ADJUDGED that the suit of plaintiff, Hubert P. Daigle,

against defendants, Potaschnick-Harrison Construction Company and the M/V KENNETH JAMES, be and the same is hereby dismissed, with prejudice, at plaintiff's costs.

Thus Done and Signed by Lafayette, Louisiana, this 30th day of July, 1986.

ROBERT H. SHEMWELL, CLERK

BY: RONALD H. WEATHERS
Deputy Clerk

APPROVED AS TO FORM:

JOHN M. DUHE, JR.
JOHN M. DUHE, JR.
UNITED STATES DISTRICT JUDGE

ENTERED: _____

Judgment Entered - 8-5-86
Filed with Clerk - 8-5-86
By: CD
Copy to: Borne, Bourgeois, Grace

APPENDIX "F"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HUBERT DAIGLE	* CIVIL ACTION
VERSUS	* NO. 83-1568
PATASCHNICK-HARRISON CO., ET AL	* SECTION "L"

****

ORDER

Considering the foregoing Motion For Judgment Notwithstanding The Verdict And In The Alternative For A New Trial;

IT IS HEREBY ORDERED that the above captioned matter be fixed for hearing on the _____ day of _____, 1986, at_____ ___.M., before the Honorable_____ Judge.

Motion is denied. No proper objection was made.

RENDERED and SIGNED on this 15 day of AUG, 1986, at Lafayette, Louisiana.

JOHN M. DUHE, JR.
UNITED STATES DISTRICT JUDGE

COPY SENT:
DATE: 8-18-86
BY: MS
TO: BORNE, BOURGEOIS, GRACE

Received Aug 15, 1986, Robert H. Shemwell, Clerk, Western District of Louisiana Shreveport, Louisiana

Filed Aug 18, 1986, Robert H. Shemwell, Clerk, U.S. District Court, Western District of Louisiana.

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-4631
SUMMARY CALENDAR

HUBERT P. DAIGLE,
Plaintiff-Appellant,

versus

PATASHICK-HARRISON CONSTRUCTION COMPANY, ET AL
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana (CV-83-1568)

(July 2, 1987)

Before CLARK, Chief Judge, GARWOOD AND HILL, Circuit Judges. PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and

Hubert P. Daigle sued his former employer Patashick-Harrison Construction Company (Patashick) for damages claiming that he injured his back on the job. The jury returned a verdict against Daigle. Daigle appeals complaining that his case was prejudiced by the district court's ruling that allowed a twenty year synopsis of his criminal record into evidence. He also claims the evidence was contrary to the jury's verdict. For the reasons set out below, we affirm.

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burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On September 10, 1982, Daigle was starting his second day as a Patashick employee. He was assigned to a small tug boat, the M/V KENNETH JAMES, as a deckhand. Patashick operated the M/V KENNETH JAMES in conjunction with a large dredge barge, the M/V MR. JOE. Daigle's brother, Lennett Daigle, was captain of the M/V KENNETH JAMES.

On the evening of September 10 Daigle and his brother were the only two persons on board the M/V KENNETH JAMES. The tug was grounded with a malfunctioning engine clutch. Daigle's brother ordered him to go down to the engine room to check on the engines. The alleged accident took place in the

engine room. Daigle claimed he slipped on the stairs leading down into the engine room because they were covered with an oily film, injuring his back. There was no other eyewitness to the fall. Daigle later that evening told his brother about the fall but did not inform any other Patashick employee about the accident. While he finished his shift on September 10, Daigle did not return to work for Patashick after this date.

In June 1983 Daigle filed suit in Louisiana State Court against Patashick seeking damages for his back injury. He premised his cause of action on the Jones Act and the unseaworthiness of the M/V RUSSELL JAMES. Patashick removed

the action to federal court.[1] At trial the major conflict between the parties and in the testimony was whether the accident had even occurred. Daigle testified that he in fact fell, that he did not return to work because of the pain in his back, that after three months he could no longer stand the pain

---

[1] While 28 U.S.C. s1445(a) bars removal of Jones Act claims filed in state court, Daigle has waived any statutory objection by participating fully in the proceedings before the district court. Lirette v. N.L. Sperry Sun, Inc., slip op. at 4829 (No. 86-3373), ___F.2d____ (5th Cir. 1987) (en banc).

and consulted a doctor, and that since his initial consultation he has been under the care of a physician for a ruptured disk and spinal bone spurring. Lennett Daigle testified that he saw his brother getting up off the engine room floor and that he immediately reported the accident to the shift foreman Bobby Long.

Patashick countered with Bobby Long's testimony that neither he nor any other Patashick employee was ever informed of the accident and that Daigle left work, never returned, and never gave any explanation as to why he left. Patashick also sought to impeach the credibility of Daigle's testimony on several points. Patashick's counsel

questioned Daigle on several inconsistent statements regarding his reporting of the accident, his description of his past and future employment, and his criminal record. On the last point Patashick introduced a two-hundred page synopsis of Daigle's criminal record dating bact to 1960. Daigle's attorney objected to this synopsis on the basis of "hearsay, nothing else." The court overruled the

objection and admitted the record into evidence.[2]

The jury returned a verdict finding no Jones Act negligence on Patashick's part and concluding that the M/V RUSSEL JAMES was seaworthy. The district court entered a judgment dismissing Daigle's action. Daigle moved for a judgment notwithstanding the verdict and alternatively a new trial claiming that

---

[2] On the next day of trial Daigle's attorney renewed his objection to the criminal record based on hearsay grounds and on the basis that the record was damaging and involved accidents that occurred many years in the past. The district court overruled the objection on the basis that it was untimely.

(1) the admission of his criminal record substantially prejudiced his case, (2) the defense counsel made improper remarks during his closing argument, and (3) the evidence was insufficient to support the jury verdict.[3] The court overruled the motion, specifically noting that no proper objection to the criminal record evidence had been made.

II.

On appeal Daigle raises the same three grounds in an attempt to gain a

---

[3] Daigle had requested a directed verdict at the close of the defendant's case. The request was overruled, but Daigle did comply with Fed. R. Civ. (50) b so that there was a predicate for his j.n.o.v. motion on sufficiency of the evidence.

new trial. We examine each contention in turn.

As to Daigle's complaint that the admission of his criminal record was erroneous and prejudicial, we first note that Daigle has preserved error on this issue only as to his hearsay objection. To preserve a claim of error for appellate review there must be a timely objection expressly stating the asserted grounds of inadmissibility of the evidence. See Pregeant v. Pan American World Airways, Inc., 762 F.2d 1245, 1248 (5th Cir. 1985); Fed. R. Evid. 103 (a)(1). The only timely objection to the admission of the criminal record was "hearsay, nothing else." As the district court found, the other possible

grounds for inadmissibility raised later by Daigle were asserted in an untimely fashion. Such a finding, as with any evidentiary decision, is reviewed under an abuse of discretion standard. See United States v. Weddell, 800 F.2d 1404, 1405 (5th Cir. 1986). We agree with the district court that the additional grounds for objection should have been asserted earlier, and accordingly we find no abuse of discretion on this ruling.

Even assuming (without deciding) that Daigle's hearsay objection to the synopsis of his criminal record has some merit and that error was committed in admitting it, we do not believe the admission of this record substantially

prejudiced Daigle's case thus requiring reversal. Fed. R. Civ. P. 61. Our review of the record indicates that Daigle's credibility, a crucial element in deciding whether an accident did or did not occur, had been placed into serious question on several occasions even before his criminal record was brought up. On numerous occasions during cross-examination Daigle admitted to inconsistent statements about whether he had ever suffered injuries on the job and about whether he had filed suits involving other on-the-job injuries. At one point Daigle even admitted to making a sworn statement after he left Patashick's employment that he had never suffered an on-the-job injury. After

reviewing Daigle's testimony we find it to be so riddled with inconsistencies, retractions, and unclear qualifications such that the admission of his criminal record, even if error, cannot be said to have substantially prejudiced his case. Accordingly, we find no basis on this point of error to order a new trial.

Daigle's second point of error is that the defense counsel made an improper jury argument. Daigle claims the defense counsel referred to a matter outside of the record during his closing statement and that this reference inflamed the jury. This point of error is meritless.

The district court had ruled after opening statements that a deputy sheriff

Lonnie Cavalier could not testify during the trial because he had been left off the pretrial witness list. Cavalier arrested Daigle in a recent barroom brawl and had sued Daigle for injuries he had sustained while trying to restrain Daigle. During opening statements defense counsel mentioned he would call Cavalier. This of course did not occur, and during his closing remarks Daigle's counsel mentioned Cavalier's absence. Defense counsel objected, but the court ruled that both attorneys would be allowed to discuss Cavalier's absence so long as each explained it was based on the court's ruling. Consistent with this limitation, defense counsel then later explained Cavalier had not

been called because of a court ruling. Daigle's counsel objected and moved for a mistrial. The court denied the motion.

A trial judge is afforded broad discretion in controlling all facets of a trial including closing arguments. See Cranberry v. Consumers Union of United States, Inc., 756 F.2d 382, 391 (5th Cir. 1985). Daigle interjected the absence of Cavalier in the closing arguments and we find no abuse of discretion nor prejudice to Daigle as a result of the above procedure.

Finally, Daigle complains that there was insufficient evidence to support the jury verdict. We review

this claim by using the substantial evidence test of Boeing Co. v. Shipman 411 F.2d 365, 374 (5th Cir. 1969) (en banc). Employing this standard we have no difficulty in finding that there was substantial evidence to support the jury's verdict. This case was basically a swearing match--did the accident occur or did it not. Both sides presented evidence suggesting different answers to this basic query. The matter was properly submitted to the jury and, viewing the evidence in the light most favorable to it, its answer is reasonable. Accordingly, we decline to disturb it.

III.

Finding no merit to any of Daigle's points of error, we affirm the judgment in all respects.

AFFIRMED.

APPENDIX "H"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 86-4631

HUBERT P. DAIGLE,

Plaintiff-Appellant,

versus

PATASCHNICK-HARRISON CONSTRUCTION COMPANY, ET AL.,

Defendants-Appellees

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING

(JULY 27, 1987)

Before CLARK, Chief Judge, and GARWOOD and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

ROBERT MADDEN HILL
United States Circuit Judge

CLERK'S NOTE: See Frap and Local Rules 41 for Stay of the Mandate.

Filed Jul 27,1987, U.S. Court of Appeals, Gilbert F. Ganucheau, Clerk